Filed 2/28/19 P. v. Fuentes CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VICTOR HUGO FUENTES, Defendant and Appellant.	D074886 (Super. Ct. No. RIF1506016)

APPEAL from a judgment of the Superior Court of Riverside County, Candace J. Beason, Judge. Reversed in part, affirmed as modified in part, and remanded for resentencing.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

In this drive-by shooting case, where the only significantly disputed issue was the shooter's identity, a jury convicted Victor Hugo Fuentes of willful, deliberate and premeditated attempted murder (Pen. Code,[1] §§ 664, 187, subd. (a), count 1), discharging a firearm into an inhabited dwelling (§ 246, count 2), and active participation in a criminal street gang (§ 186.22, subd. (a), count 3). On counts 1 and 2, the jury also found true certain firearm and gang enhancement allegations. The court sentenced Fuentes to prison for 50 years to life.

On appeal, Fuentes contends that his conviction on count 2 should be reversed because the People added that count to the accusatory pleading after he waived his preliminary hearing. Because defense counsel did not raise this issue in the trial court, and to avoid forfeiture on appeal, Fuentes contends that his attorney's failure to object or seek dismissal of count 2 constitutes ineffective assistance of counsel. The Attorney General concedes the error, but argues it is harmless. We conclude that counsel's failure to object was prejudicial and, therefore, reverse Fuentes's conviction on count 2.

Fuentes also contends his other convictions should be reversed because the trial court erroneously (1) allowed a police officer to opine that Fuentes was guilty, (2) allowed the prosecutor to ask Fuentes whether he possessed a gun in a prior burglary, and (3) excluded evidence that the victim/eyewitness was under the influence of methamphetamine and/or opiates at the time of the shooting. Fuentes asserts that these errors, even if not prejudicial individually, are so cumulatively. We conclude that

---

1 Undesignated statutory references are to the Penal Code.

evidence Fuentes possessed a firearm in a prior burglary was inadmissible; however, that error is harmless. We reject Fuentes's other contentions and, therefore, affirm his convictions on counts 1 and 3.

Additionally, Fuentes contends, and the Attorney General agrees, that the court rendered an unauthorized sentence. The correct sentence on count 1 is life imprisonment with a minimum parole period of 15 years, plus 25 years to life for the firearm enhancement. We so modify the judgment.

Moreover, while this appeal was pending, the Legislature enacted section 12022.53, subdivision (h), which gives the trial court discretion to strike or dismiss the 25-year-to-life firearm enhancement. Fuentes contends, the Attorney General concedes, and we agree that the case should be remanded to allow the trial court to exercise its discretion in determining whether to strike or to impose this enhancement.

FACTUAL BACKGROUND

A. *The People's Case*

In August 2015 Carlos G.'s nine-millimeter handgun was stolen. Carlos believed that Fuentes, an acquaintance of his and a drug dealer, stole the gun. After Fuentes denied stealing the gun, he and Carlos exchanged threatening text messages.

About a week later, Carlos and two others went to Fuentes's home. Carlos was angry, feeling "that people are just laughing" at him because he was not doing anything to retrieve his stolen gun from Fuentes. When no one answered Carlos's knock on the front door, he and his cohorts threw bricks and a cement slab through windows. Fuentes was not home. When Fuentes's brother, Omar, came outside, Carlos attacked him, believing

Omar was Fuentes (the two look alike). After realizing that he was beating the wrong man, Carlos left.

Neighbors heard the commotion and called police. Although Omar's face was swollen and he had numerous cuts and bruises, he declined to press charges.

Fuentes arrived home while police were still there. He was angry and upset. Fuentes suspected that Carlos had attacked Omar.

Fuentes and Omar are members of a criminal street gang, the Kush Blowing Kings (KBK). KBK members meet at Fuentes's house. Fuentes has posed on social media with gang symbols and has tattoos memorializing his allegiance to KBK. Fuentes also has a tattoo that reads "Jay." This is a reference to a KBK member who was killed by a rival gang. KBK's primary activities are selling narcotics, violent assaults, robberies, and shootings. Gang members earn respect by violence, fear, and intimidation.

Later that same night, Carlos and some family members were watching television in the garage of his residence. The garage door was open. Carlos was "keeping an eye out" because he feared retaliation for beating Omar. He expected a fist fight. Around 10:55 p.m. a car with its lights off drove slowly in front of Carlos's house. Carlos was about 30 feet from the car when, from the passenger side, 18 shots were fired from a .22-caliber weapon. One of the rounds hit Carlos in the abdomen; others hit the house. A gang expert testified that this was a "classic gang" shooting to establish fear and respect.

Riverside County Sheriff's Deputy Joshua Hephner responded to the shooting. He activated his voice recorder and accompanied Carlos in the ambulance. The recording

was played for the jury. At one point, Carlos told Deputy Hephner that Fuentes was the shooter:

"Hephner: . . . Tell me who it was.

"[Carlos]: Victor.

"Hepner: Victor what?

"[Carlos]: Fuentes."

Later in the ambulance, however, Carlos stated that the shooter was "Vincent," and that Fuentes was not the shooter, but "just involved." At the hospital, Deputy Hephner showed Carlos a photographic lineup that included Fuentes. Carlos identified Fuentes as the shooter.

Deputy Saul Fernandez interviewed Carlos in the hospital a few days after the shooting. The recording of that interview was played for the jury. In that interview, Carlos identified Fuentes as the shooter and stated that he "clearly" saw Fuentes.

At trial, Carlos testified he was "100 percent sure" who shot him; however, fearing retaliation, he refused to identify the shooter in court.[2]

Police arrested Fuentes about two weeks after the shooting. His police interrogation was played for the jury. After being Mirandized,[3] Fuentes repeatedly denied shooting Carlos. However, after about an hour of interrogation, Fuentes said that

---

2 On cross-examination, Carlos conceded that Omar might have been the shooter because Omar and Fuentes resemble each other.

3 *Miranda v. Arizona* (1966) 384 U.S. 436.

Joshua Boguett was in the car at the time of the shooting.[4] After about 75 minutes of questioning, Fuentes confessed, claiming he was only firing "warning shot[s]" at Carlos and did not intend to shoot him. However, when Deputy Fernandez pressed Fuentes to identify the driver and the person who supplied the gun, Fuentes retracted his confession saying, "I'm gonna stick with my story that it was not me."

B. *Defense Case*

Omar testified that he did not know who assaulted him, and he did not tell Fuentes that Carlos had attacked him. He denied being a KBK member, and testified that KBK is not a gang, but a "group of friends" who "didn't do anything bad." Omar denied shooting Carlos.

Colacion testified that he, Boguett, and Hall committed the shooting. They used Boguett's car. Colacion was in the backseat, Hall drove, and Boguett brought the rifle and shot. Colacion testified that Fuentes had "nothing to do with it."

On cross-examination, Colacion conceded that KBK members have committed robbery, burglary, stabbings, and shootings. He admitted telling police that he knew nothing about the shooting and that he has told "lie after lie" about the shooting.

Fuentes testified in his own defense. He admitted having juvenile court adjudications involving conspiracy to commit burglary in 2011, second degree burglary

---

[4] Boguett, along with Charlie Colacion and Kenneth Hall are KBK members and at one point were codefendants with Fuentes. Before trial, Boguett, who allegedly supplied the car, pleaded guilty to assault with a firearm and committing a crime in association with a criminal street gang. Colacion, alleged to be the lookout, pleaded guilty to being an active participant in the criminal street gang. Hall, the driver, pleaded guilty to participating in the criminal street gang.

and possession of methamphetamine in 2013, and possession of methamphetamine in 2014. Although Fuentes admitted past membership in KBK, he testified that he quit the gang in 2012.

Fuentes denied stealing Carlos's gun, but conceded that there were heated text messages between the two of them about it. Fuentes testified that on the night of the shooting, he was at his girlfriend's house around 8:30 p.m. when Colacion stopped by there to talk. Colacion knew that Omar had been attacked. Fuentes testified that later Hall and Boguett, who were upset about Omar being attacked, picked him up to get some fast food, and they returned to his girlfriend's house about 20 minutes later, at approximately 10 p.m. Fuentes testified that he did not see Hall, Boguett, or Colacion again that night. Fuentes testified that he had nothing to do with the shooting. He explained that he falsely confessed to police because he was scared, and his mind was "racing" from having been awake all night after taking methamphetamine.

On cross-examination, Fuentes admitted that he had told "a lot of stories" in this case and was telling a "whole new one" in court. He admitted that Hall, Boguett, and Colacion are KBK members. Fuentes also conceded that Deputy Fernandez did not "make" him talk and "never forced" him to say anything.

DISCUSSION

I. *COUNT 2 MUST BE REVERSED BECAUSE THE CHARGE WAS ADDED AFTER FUENTES WAIVED A PRELIMINARY HEARING*

A. *Procedural Background*

On October 16, 2015, the district attorney filed a third amended complaint against Fuentes, Hall, Boguett, and Colacion. Count 1 charged each defendant with the attempted deliberate and premeditated murder of Carlos, along with gang and firearms enhancements. Count 2 alleged active participation in a criminal street gang. On December 15, 2015, Fuentes was arraigned on the third amended complaint and denied the charges and allegations.

On February 9, 2016, Fuentes stated that he intended to waive his right to a preliminary hearing. The court told Fuentes this waiver would relieve the district attorney of his obligation to prove sufficient evidence existed to make him stand trial for "these offenses"—i.e., the counts charged in the third amended complaint. Fuentes and the People waived his preliminary hearing. The court found that "by virtue of the waiver" there was sufficient evidence to believe Fuentes was "guilty of the crimes with which he is charged" as well as the alleged enhancements. The court held Fuentes to answer "those charges and allegations . . . ." The preliminary hearing proceeded with the other defendants.

At the preliminary hearing, Carlos testified that Fuentes shot from a slow-moving car and some bullets struck the house. The court held the defendants to answer on counts

1 and 2 and volunteered, "[A]lso appears that a violation of . . . [s]ection 246 occurred in that shots were fired into the house . . . ."[5]

A week later the district attorney filed an information against Fuentes and the other defendants. The information added a new charge—a section 246 violation as count 2. The criminal street gang count (former count 2) became count 3. Represented by the same attorney who appeared with him when he waived his preliminary hearing, Fuentes did not object to the addition of new count 2, but instead pleaded not guilty to these charges.

About a year later, the People filed a first amended information, naming only Fuentes and charging the same three counts.[6] Now represented by privately retained counsel, Fuentes pleaded not guilty. In March 2017 the People filed a second amended information that corrected a date error and made other minor changes. Count 2 continued to allege a violation of section 246. Fuentes maintained his not guilty pleas and denial of the enhancement allegations.

The jury convicted Fuentes of violating section 246, and the court sentenced him on that count to a concurrent term of 15 years to life, plus 25 years under section 12022.53, subdivision (d).

---

5 Section 246 prohibits maliciously and willfully discharging a firearm at an inhabited dwelling.

6 When the first amended information was filed, Hall, Boguett and Colacion had already pleaded guilty to certain offenses.

B. *Analysis*

"It is well settled that where a defendant waives a preliminary hearing, the prosecution may not amend the information to add new charges. [Citations.] This is so, even if the amendment would not prejudice the defendant or if the defendant had notice of the facts underlying the new charges." (*People v. Rogers* (2016) 245 Cal.App.4th 1353, 1360 (*Rogers*), italics omitted.) "Simply put, section 1009 prohibits adding new charges to an accusatory pleading after the defendant has waived his right to a preliminary hearing on that pleading."[7] (*People v. Peyton* (2009) 176 Cal.App.4th 642, 654 (*Peyton*).) A defendant waives this error by failing to object. (*People v. Workman* (1953) 121 Cal.App.2d 533, 535 (*Workman*).)

The Attorney General concedes that the trial court erroneously allowed the People to add the section 246 charge to the information when Fuentes never received a preliminary hearing on that charge. However, Fuentes waived that error by not objecting. (*Workman*, *supra*, 121 Cal.App.2d at p. 535.)

To avoid forfeiture of this issue on appeal, Fuentes contends his attorney rendered ineffective assistance. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial. (*People v. Brown* (2014) 59 Cal.4th 86, 109.) "The defendant may establish

---

7 Section 1009 provides in part: "An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

the first prong of an ineffectiveness claim by showing there could be no satisfactory explanation for counsel's act or omission." (*Peyton*, *supra*, 176 Cal.App.4th at p. 652.)

In *Peyton*, *supra*, 176 Cal.App.4th 642, the court found that defense counsel's failure to object to a new charge added after the defendant waived a preliminary hearing was ineffective assistance of counsel. The court stated there could be no satisfactory explanation for counsel's failure to object, and prejudice existed because the jury convicted the defendant on that charge. (*Id.* at pp. 654-655.) Likewise, in *Rogers*, *supra*, 245 Cal.App.4th 1353, defense counsel's failure to object to an added charge after the defendant waived his preliminary hearing constituted ineffective assistance of counsel. (*Id*. at p. 1361.)

Similarly here, defense counsel's failure to object or move to set aside the information is ineffective assistance of counsel.[8] There could be no satisfactory reason for not objecting to the additional charge that exposed Fuentes to a longer sentence with no benefit. Prejudice is established by Fuentes's conviction on count 2.

Disagreeing with this analysis, the Attorney General contends that defense counsel may have wanted count 2 to provide the jury with an opportunity to convict on something between premeditated attempted murder and an acquittal. The Attorney General argues that the worst case scenario that occurred (conviction on both counts) did not add any "immediate time to the sentence" because the court imposed concurrent terms on counts 1 and 2. The Attorney General also asserts that defense counsel may have determined that

---

8 Fuentes's appellate counsel did not represent him in the trial court.

any objection would have been futile because the prosecution could dismiss and refile the charges.

These arguments are unavailing. The main issue at trial was the shooter's identity, and if the jury found that Fuentes was the shooter it would necessarily find him guilty of both shooting Carlos and the house. In closing argument the prosecutor made this precise point, telling the jury that the evidence on these two counts was identical.

Moreover, the Attorney General concedes that if the jury found the gang and firearm enhancements to be true, then counts 1 and 2 each carried the same sentence of life with a minimum parole period of 15 years, plus 25 years-to-life for the firearm enhancement. Failing to object to count 2 subjected Fuentes to the risk of consecutive sentences. Although the Attorney General asserts that "arguably" one of the sentences might be stayed under section 654, he cites no authority and provides no legal analysis for applying section 654 to these counts. Accordingly, the point is waived. (*People v. Roberto V.* (2011) 93 Cal.App.4th 1350, 1364, fn. 6.) Further, an objection would not have been futile. The prosecution could not simply dismiss and refile because the People could not proceed against Fuentes based on a preliminary hearing at which he was absent. By not objecting to the newly added count 2, defense counsel exposed Fuentes to consecutive sentences with no strategic upside. Accordingly, Fuentes's conviction on count 2 must be reversed.

II. *THE INVESTIGATOR DID NOT GIVE IMPROPER OPINION TESTIMONY*

A. *Additional Background*

Deputy Fernandez was the lead investigator. He conducted all the interviews, including the interrogation where Fuentes confessed. On cross-examination, defense counsel sought to establish that Deputy Fernandez had a preconceived belief or bias that Fuentes was the shooter:

> "[Defense counsel]: So in other words, you started this interview from the start—from the very beginning with a conclusion that he did it; correct?
>
> "[Fernandez]: Correct.
>
> "[Defense counsel]: So you're going to interview him no matter how long it took for him to agree with what you already concluded; correct?
>
> [Objection sustained]
>
> "[Defense counsel]: So you as an investigator started this interview, not with an open mind but with a conclusion that he did it; correct?
>
> [Objection overruled]
>
> "[Fernandez]: . . . Can you repeat that question one more time?
>
> "[Defense counsel]: You just testified you started the interview from the very start—you started with the—you already had the conclusion—
>
> "[Prosecutor]: Objection. Vague as to time as to when the investigation started.
>
> "The Court: I think we're talking about at the beginning of the interview.
>
> "[Defense counsel]: At the beginning of the interview . . . [¶] . . . you started it with a conclusion that he was the shooter; correct?

[Objection overruled].

"[Fernandez]: . . . Repeat it one more time.

"[Defense counsel]: Did you start the interview—you said sometimes you have to tell a subject something to get him to—did you start the interview with a conclusion—before you even said word number one, with a conclusion that he was the shooter because of the witness statement?

"[Fernandez]: Yes."

On redirect, Deputy Fernandez testified that he interviewed "other people potentially involved in this case," including Boguett, Hall, and Colacion. The prosecutor continued:

"[Prosecutor]: With all those statements that you got in this case—and don't tell us anything about what those statements were, but with all of those statements, did your suspicion about who fired those shots ever waiver [*sic*] from being [] Fuentes?

"[Defense counsel]: Objection.

"The Court: Legal grounds?

"[Defense counsel]: Speculation.

"The Court: Overruled.

"[Fernandez]: Yes.

"[Prosecutor]: Your suspicion wavered?

"[Fernandez]: I'm sorry. Can you repeat the question?

"[Prosecutor]: . . . [¶] With all the information that you have in this case, did you have any suspicion that there was another shooter in this case besides [] Fuentes?

"[Fernandez]: No.

"[Defense counsel]: Objection. Relevance.

"The Court: Overruled."

B. *Fuentes's Contention*

Fuentes contends that Deputy Fernandez rendered an improper opinion that Fuentes was the shooter. He also contends that by referring to witness statements, Deputy Fernandez made an "end run" around *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) by suggesting that the out-of-court statements supported his opinion. To the extent that defense counsel's relevancy objection was insufficient to preserve the issue, Fuentes reframes the issue as one involving ineffective assistance of counsel.

C. *Analysis*

A witness cannot express an opinion concerning the defendant's guilt. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46.) Opinions on guilt are inadmissible because they do not assist the trier of fact. "[T]he trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (*Id.* at p. 47.) The trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.)

Assuming without deciding that defense counsel's relevancy objection properly preserved the issue for appellate review, the trial court did not abuse its discretion in allowing this testimony. The defense theory was that Deputy Fernandez conducted a biased investigation that ignored other suspects. On cross-examination, Fuentes's attorney questioned Deputy Fernandez about whether "from the very beginning" the

deputy believed that Fuentes was the shooter. And in closing argument, defense counsel urged the jury to acquit because of a biased and inadequate police investigation, stating, "[Y]ou remember my questioning of [Deputy Fernandez]? He already had his conclusion, and he's going to do whatever it takes to get—where's the investigation?"

In light of this defense theory, the prosecutor could properly seek to rebut these inferences by inquiring about the scope of the deputy's investigation. This would enable the jury to decide whether the lead investigator was biased and, if so, whether the police adequately investigated other potential suspects. Moreover, the prosecutor never asked Deputy Fernandez for his opinion on whether Fuentes attempted to murder Carlos. Rather, the deputy testified, based on information he had obtained over the course of his investigation, that Fuentes was the primary suspect.

During Deputy Fernandez's interrogation of Fuentes, which was played for the jury, the deputy told Fuentes, "[T]he more you lie . . . the worse it looks on you." He said that Carlos told him that Fuentes was the shooter. He told Fuentes that police had his threatening text messages. Deputy Fernandez told Fuentes, "I know what happened. Okay? Carlos told me everything . . . ." He said, "You were the passenger. . . . I want to know who was the driver." When Fuentes said, "I wasn't in the car," the deputy replied, "So you—you're gonna sit here and lie to me . . . ." Given the tenacity of Deputy Fernandez's interrogation of Fuentes, the jurors no doubt believed that when the deputy arrested Fuentes, he had a strong belief that Fuentes was the shooter. It is extraordinarily unlikely that jurors believed Deputy Fernandez interrogated Fuentes for over an hour and

deflected Fuentes's repeated denials because of a belief in his innocence. Therefore, even if there was error, it was harmless under any standard of prejudice.

Crawford, supra, 541 U.S. 36 holds that out-of-court statements made to police regarding a defendant are inadmissible in a criminal trial where the declarant is unavailable and was not previously subject to cross-examination by the defendant. (*Id*. at p. 59.) There was no *Crawford* violation here because no hearsay statements were admitted into evidence.[9]

III. *PRIOR POSSESSION OF .38-CALIBER FIREARM*

A. *Additional Background*

At the scene, police found 18 shell casings from a .22-caliber weapon. In September 2013 (about a year and a half before the shooting), Fuentes was charged (as a juvenile) with a burglary in which he possessed a .38-caliber gun. Before Fuentes testified, defense counsel sought to exclude such evidence because that juvenile charge was dismissed and the evidence would be "extremely prejudicial" under Evidence Code section 352.

The court noted that in the police interrogation, Fuentes initially denied involvement, but then confessed to firing the gun "a number of times." Based on this evidence, the court stated that a "subject of inquiry" would be "are you familiar with

---

9 Because there was no error, it is unnecessary to address Fuentes's arguments that counsel was constitutionally ineffective for failing to lodge a proper objection. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90 [failure to make a meritless objection is not ineffective assistance].) For the same reason, it is unnecessary to address whether Deputy Fernandez's challenged testimony was prejudicial.

guns, do you have guns, have you used guns, that sort of thing, and then if he denied it, of course, then the People would be entitled to impeach him with this prior conduct of having had a gun within a year and a half of this incident."

Echoing the court's theory of admissibility, the prosecutor stated, "Certainly the People's perspective on this evidence is it's almost like [Evidence Code section] 1101 evidence—right? [P]rior knowledge of firearms, prior knowledge of—you know, sort of motive. [¶] There's only one reason to carry a gun, and guns are killing instruments. That's what they are for . . . . So that's the relevancy for the People's purpose: One, for impeachment and, two, for [Evidence Code section] 1101 evidence."

Fuentes's lawyer told the court that the gun Fuentes possessed as a minor was "listed as a three auto" whereas the weapon used here was .22-caliber. The court replied, "Right, I understand. I don't think anybody is suggesting that firearm was his signature type of firearm or anything like that."

Rejecting the People's theory that the conduct underlying the prior juvenile charge was admissible to impeach, the court prohibited the prosecutor from asking Fuentes if he was previously charged with possessing a firearm. However, the court ruled that if Fuentes "denies knowing anything about firearms or hasn't handled one, something of that nature," then the prosecutor could offer evidence that Fuentes had firearms "in the past."

On direct examination, Fuentes testified that during his police interrogation, when deputy Fernandez asked whether he fired two, three, four, or six shots, he just agreed with whatever the deputy said because his mind was racing and he was not processing

information. On recross-examination, when the prosecutor asked Fuentes about his experience with firearms, the following colloquy occurred:

"Q: What kind of experience do you have with firearms?

"A: I've been—I've had a firearm on me before.

"Q: One of your prior cases; right?

"A: Correct.

"Q: When you burglarized that store, you had a loaded .38 caliber revolver in your pocket, didn't you?

"A: I don't know if it was a revolver, but, yeah, I had a .380.

"Q: A .380. You know a little bit about guns, then?

"A: Correct."

B. *Analysis*

Fuentes contends the court erroneously allowed the prosecutor to elicit evidence that he possessed a .38-caliber handgun. He asserts the evidence was not relevant, and was also inadmissible character evidence, improperly designed to show his propensity to use a gun. We agree. "Generally, public policy prohibits a prosecutor from introducing evidence concerning a defendant's uncharged conduct or offenses in order to prove a defendant's character or propensity to commit a crime. . . . The purpose of this evidentiary rule 'is to assure that a defendant is tried upon the crime charged and is not tried upon an antisocial history.' [Citation.] [¶] However, a well-established exception to the general rule is that a defendant's uncharged conduct may be admitted "'not to prove a person's predisposition to commit such an act, but rather to prove some other material

fact, such as that person's intent or identity.""" (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1176.)

Relevant here, when the prior bad act consists of possessing a firearm, the following rules apply: "When the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056 (*Barnwell*).) "Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons—a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant." (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360.)

However, evidence of weapons not actually used in the commission of a crime may be admissible when they are relevant for other purposes. (*People v. Cox* (2003) 30 Cal.4th 916, 956, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The critical inquiry is whether the weapons evidence bears some relevance to the weapons shown to have been involved in the charged crimes or is being admitted simply as character evidence. (*Barnwell, supra,* 41 Cal.4th at pp. 1056-1057.)

Here, Fuentes's prior possession of a .38-caliber gun is not relevant to determining the identity of the person who committed the drive-by shooting, which involved a .22-caliber weapon. "To be admissible on the issue of identity, an uncharged crime must be highly similar to the charged offenses, so similar as to serve as a signature or fingerprint."

(*Barnwell, supra,* 41 Cal.4th at p. 1056.) We therefore conclude that his statements about having a gun "on him" in the past should not have been admitted.[10]

Fuentes contends that the prejudicial effect of the purported error must be measured under the *Chapman* standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) However, error in admitting prior-crimes evidence is subject to the standard of review articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Malone* (1988) 47 Cal.3d 1, 22.) Under the *Watson* standard, prejudicial error is shown where '"after an examination of the entire cause, including the evidence,' [the court is] of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson,* at p. 836.) "[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.'" (*People v. Beltran* (2013) 56 Cal.4th 935, 956.)

The error is harmless in this case because the evidence of Fuentes's guilt was quite strong entirely apart from the evidence the jury heard concerning his prior possession of a

---

10 The Attorney General contends Fuentes forfeited this issue by volunteering that he possessed a firearm as a juvenile. We disagree. The court erred in allowing the prosecutor to ask Fuentes about his experience with firearms, and defense counsel adequately preserved that issue by objecting before Fuentes testified.

handgun. Carlos identified Fuentes as the shooter in the ambulance, in a photographic lineup in the hospital, and again while hospitalized, stating that he clearly saw Fuentes. At trial, Carlos testified that he saw the shooter's face and was "100 percent sure" who shot him. Fuentes's motive was to retaliate for Carlos's brutal attack on his brother and fellow KBK gang member, Omar. Days before the shooting, Fuentes sent Carlos threatening text messages. The gang expert testified that the drive-by was a "classic" shooting to establish fear and respect. And in addition to all this, Fuentes confessed to police that he was the shooter.

Our conclusion that there was no prejudicial error is reinforced by the manner in which counsel argued the case. The prosecutor told the jury that Fuentes admitted being the shooter. The prosecutor emphasized that Fuentes sent threatening text messages and Carlos identified Fuentes from photographs. Fuentes cites nothing in the prosecutor's closing arguments about the .38-caliber handgun. To the contrary, the People's closing argument theme was, "Do you believe Victor Fuentes' confession?. . . . [¶] . . . [¶] You have evidence of a guy lying, lying, lying, lying, and breaking down and crying as he confesses. That's the evidence, and that has never been rebutted."

Carlos's in-hospital identification of Fuentes was very credible. Fuentes's confession was compelling, his retraction was not, and—viewing the record as a whole—excluding the challenged evidence would not have made a difference in the verdict.[11]

---

11 To the extent that Fuentes also claims the admission of such evidence violated his federal constitutional rights to due process, the claim fails because it is based entirely upon his state law claims of error. (*People v. Carter* (2003) 30 Cal.4th 1166, 1196.)

IV. *THE COURT DID NOT ERRONEOUSLY EXCLUDE EVIDENCE OF CARLOS'S DRUG USE*

A. *Additional Background*

On cross-examination, Fuentes's lawyer asked Carlos, "In fact, you don't use methamphetamine?" Carlos answered: "I do not."

Later, outside the jury's presence, the court conducted a hearing to determine if Carlos's treating physician would be allowed to testify about Carlos's drug use. Defense counsel told the court that he "spoke with the doctor yesterday" and that blood tests performed before Carlos's surgery showed methamphetamine and opiates.

The prosecutor acknowledged that prior use of methamphetamine may be relevant to Carlos's eyewitness identification. However, the People argued the evidence was not admissible to *impeach* Carlos's denial of methamphetamine use because defense counsel's question pertained only to his *current* use of methamphetamine, not whether he used it on the day of, or shortly before the shooting.

After having the court reporter read back that part of Carlos's testimony, the court agreed with the prosecutor, stating, "[T]he question was posed in the present tense . . . [a]nd the answer was no. [¶] . . . We don't have any impeachment from that question and answer."

The court then addressed whether defense counsel would be allowed to ask Carlos about his methamphetamine use at the time of the shooting. The court asked defense

counsel whether he had asked the treating physician whether the drugs found in Carlos's blood could affect perception. Fuentes's lawyer said, "No, I haven't."

The court noted that in some cases, perception may actually be enhanced by amphetamines and methamphetamines. The court ruled that unless the physician were to testify that the drugs detected "were such that it impacted on [Carlos's] ability to perceive and recollect," the court could not rule on the issue.

The court suggested that defense counsel telephone the physician so "we would know where we're going with this." However, the record does not indicate that Fuentes's lawyer contacted the treating physician. Rather, defense counsel pointed to Carlos's hospital records, which contained a notation that Carlos denied using drugs. However, the court questioned the relevance of Fuentes "having lied on one occasion" and asked defense counsel if he knew whether medications had already been administered to Carlos when those records were prepared. Fuentes's lawyer said, "*No. I'll just submit.*" (Italics added.) The court replied, "Okay. Then the request at this juncture is denied."

B. *Analysis*

Fuentes contends the court erroneously prohibited him "from cross-examining [Carlos] about his methamphetamine use during the time period of the shooting . . . ." Fuentes asserts such evidence was relevant to Carlos's identification of him as the shooter and to impeach Carlos if he denied using methamphetamine.

Before reaching the merits, we address the Attorney General's contention that Fuentes has forfeited this issue. The Attorney General contends that because the trial

court stated it was precluding this evidence "at this juncture," the ruling was only tentative, and Fuentes has forfeited the issue by not seeking a final ruling later.

The issue is not forfeited. The phrase "at this juncture" is ambiguous. It may reasonably be construed as a slightly formal or stilted way of saying that a final ruling is being made "now." Or, it might also reasonably be construed as implying the court might reconsider its ruling at a future time in light of new or different facts. Here, there is no indication that defense counsel intended to speak further with Carlos's physician or make any additional foundational showing about the effect of the claimed drug use on Carlos's ability to perceive or recollect. Accordingly, the record shows that the court and counsel considered the ruling to be final, and we do as well.

Turning to the merits, the court did not abuse its discretion in requiring a foundational showing of relevancy before admitting evidence of Carlos's drug use. "[I]t is proper to show, as affecting his capacity to observe, recollect, and communicate, that a witness was intoxicated at the time the events narrated occurred." (*People v. Singh* (1937) 19 Cal.App.2d 128, 129.) However, evidence of drug consumption is admissible only "if there is expert testimony substantiating the effects of such use." (*People v. Rocha* (1971) 3 Cal.3d 893, 901 (*Rocha*).) Accordingly, the trial court correctly ruled that Fuentes first had to make a foundational showing as to the effects that methamphetamine or opiates would have had on Carlos's ability to accurately perceive the shooting, recount its details, and identify the shooter. Because Fuentes failed to do so, the evidence was properly excluded.

Disagreeing with this result, and citing *People v. Fauber* (1992) 2 Cal.4th 792, Fuentes contends it is "common knowledge" that methamphetamine deleteriously affects perception. However, *Fauber* is materially distinguishable. *Fauber* was a murder case in which the issue was whether jury misconduct deprived the defendant of a fair trial. One incident of purported misconduct occurred during deliberations when several jurors related personal anecdotes about drug use. One juror opined that drug use may have affected the memory of some witnesses. (*Id.* at p. 838.) The California Supreme Court first noted that there was no apparent connection between drug use and any issue in the case. It then explained that it is an unavoidable fact that jurors bring their life experiences to their deliberations and found no adverse impact on the verdict. (*Id.* at pp. 838-839.) *Fauber* is off point because it does not involve the foundational requirement for admitting evidence of drug use as affecting eyewitness identification.[12]

Citing *People v. Wilson* (2008) 44 Cal.4th 758, Fuentes also contends that the trial court should have allowed defense counsel to question Carlos about drug use "around the time of the shooting." However, the issue in *Wilson* was whether evidence that a witness was *habitual* methamphetamine user (i.e., a drug addict) was properly excluded when there was no evidence that witness ingested the drug on day of crimes and no expert testimony was presented to explain its long-term effect on one's ability to perceive or recall. (*Id.* at p. 790, 794.) In contrast here, the issue is whether the court properly

---

12 Fuentes's reliance on *People v. Yeoman* (2003) 31 Cal.4th 93, which also involves jurors discussing personal experiences with drug use during deliberations, is unavailing for the same reason.

excluded evidence that Carlos was intoxicated at the time of the shooting. Contrary to Fuentes's assertion, "[t]he probable effect of intoxicants other than alcohol is a topic 'sufficiently beyond [the] common experience' of most jurors that expert testimony is required." (*Pedeferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359, 374.) Moreover, absent expert testimony explaining the effects of drug use generally and specifically as to Carlos, the blood test results in Carlos's medical records were irrelevant. (*Rocha*, *supra*, 3 Cal.3d at p. 901.)

In a related argument, Fuentes contends that evidence of Carlos's methamphetamine use at the time of the shooting was admissible to impeach Carlos's trial testimony that he does not use methamphetamine. However, Carlos did not deny taking methamphetamine at the time of the shooting. Defense counsel did not ask that question. Rather, Fuentes's lawyer asked whether Carlos was *currently* using methamphetamine. Evidence that Carlos used methamphetamine at the time of the shooting does not contradict that testimony. On appeal Fuentes contends that although his trial lawyer did not ask "the clearest questions," in context his lawyer "intended" his question to cover the time period of the shooting. However, counsel's unarticulated subjective intent in asking a question is not a basis for determining the admissibility of evidence.[13]

13 It is unnecessary to consider Fuentes's contention of cumulative error because we have rejected all of Fuentes's claims except the one involving character evidence, and that error was not prejudicial.

V. *SENTENCING ISSUES*

A. *Count 1*

On count 1, the court sentenced Fuentes to 15 years to life, plus 25 years for the gun enhancement, plus 10 years for the gang enhancement under section 186.22, subdivision (b)(1)(C), for a total prison term of 50 years to life. Fuentes contends, and the Attorney General agrees, that this is an unauthorized sentence. The sentence for attempted premeditated murder is an indeterminate term of life in prison with the possibility of parole. (§ 664, subd. (a).) Section 186.22, subdivision (b)(5), pertaining to the gang enhancement, provides that where, as here, a defendant commits a crime punishable by imprisonment for life, the defendant is subject to a minimum term of 15 years before being considered for parole. This 15-year minimum term is in lieu of the 10-year determinate gang enhancement under section 186.22, subdivision (b)(1)(C). (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1404-1405 [15-year minimum parole period rather than 10-year gang enhancement applies to life term for premeditated and deliberate attempted murder].)

Section 12022.53, subdivision (d) provides:

> "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

Fuentes asserts, and the Attorney General agrees, that the court also erred in imposing 25 years, rather than 25 years to life, for the enhancement under section 12022.53, subdivision (d).

Therefore, as both Fuentes and the Attorney General agree, Fuentes's sentence on count 1 should have been life, with a minimum parole period of 15 years, plus 25 years to life.

B. *Newly Enacted Discretion to Strike the Firearm Enhancement*

When sentencing Fuentes in May 2017, the court could not strike the firearm enhancement. (§ 12022.53, former subd. (h), added by Stats. 2010, ch. 711, § 5, repealed by Stats 2017, ch. 682, §2, eff. Jan 1, 2018.) However, effective January 1, 2018, section 12022.53, subdivision (h) provides, "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Fuentes's case was not yet final when this amendment to section 12022.53 became effective. Accordingly, because section 12022.53, subdivision (h) now gives the trial court authority to lower Fuentes's sentence, Fuentes contends, the Attorney General concedes, and we agree that the matter should be remanded to the trial court to exercise its discretion in determining whether to strike the firearm enhancement. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507.)

DISPOSITION

Fuentes's conviction on count 2 is reversed. On count 1, the judgment is modified to sentence Fuentes to prison for life, with a minimum parole period of 15 years, plus 25 years to life. As so modified, the judgment on counts 1 and 3 is affirmed. The superior court clerk is directed to prepare an amended abstract of judgment reflecting the modified judgment and to forward a certified copy of the amended abstract to the Director of the Department of Corrections and Rehabilitation.

The matter is remanded for resentencing to allow the trial court to exercise its discretion in determining whether or not to impose the 25-year-to-life enhancement under section 12022.53, subdivision (d). We express no opinion on how the trial court should exercise such discretion.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.